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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-6038

JAMES EDWARD DROPE,

Petitioner,

v.

STATE OF MISSOURI,

Respondent.

ON WRIT OF CERTIORARI TO THE MISSOURI COURT OF APPEALS, ST. LOUIS DISTRICT

BRIEF FOR PETITIONER

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the Missouri Court of Appeals in this post-conviction proceeding, dated June 5, 1973, is reported at 498 S.W.2d 838 and is reprinted in the Appendix (A. 216-225). The unpublished statement of facts, conclusions of law, and order of the Circuit Court of the City of St. Louis dated June 26, 1972, is reprinted at pages 197-213 of the Appendix. The opinion of the Missouri Supreme Court dated January 11, 1971 on petitioner's direct appeal from his

conviction is reported at 462 S.W.2d 677 and is reprinted in the Appendix (A. 107-118).

JURISDICTION

The judgment of the Missouri Court of Appeals, St. Louis District, affirming the denial by the St. Louis Circuit Court of petitioner's motion to vacate his judgment of conviction and sentence pursuant to Missouri Rule 27.26, was entered on June 5, 1973 (A. 226). Petitioner's motion for rehearing or transfer to the Missouri Supreme Court was denied by the Missouri Court of Appeals on August 16, 1973 (A. 226). The Missouri Supreme Court denied petitioner's application to transfer on October 8, 1973 (A. 227), and the Petition for a Writ of Certiorari was filed in this Court on January 5, 1974. Certiorari and the motion for leave to proceed in forma pauperis were granted May 13, 1974. Jurisdiction of this Court is founded upon 28 U.S.C.A. §1257(3).

QUESTIONS PRESENTED

1. Was the petitioner, who was on trial for raping his wife, entitled to a hearing under *Pate v. Robinson*, 383 U.S. 375 (1966), to determine his mental competency to stand trial, particularly in view of his mental history and his attempted suicide during the trial?

2. Under *Diaz v. United States*, 223 U.S. 442 (1912), may a defendant on trial for a capital offense be tried and convicted in absentia while being hospitalized after attempting suicide during the course of his trial?

CONSTITUTIONAL PROVISIONS INVOLVED

Amend. VI, U.S. Constitution:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

Amend. XIV, §1, U.S. Constitution:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

STATUTES INVOLVED

The Missouri statute governing the mental capacity of a defendant to stand trial (§552.020) is set forth in full in Addendum A to this brief. Missouri's Supreme Court Rule 27.26, which controls post-conviction proceedings, is reproduced in Addendum B to this brief. The Missouri Rape Statute (§559.260) appears in Addendum C.

STATEMENT OF THE CASE

Procedural Background

Petitioner was indicted on February 26, 1969, in the Circuit Court of the City of St. Louis for the forcible rape of his wife, a capital offense under Missouri law, which was alleged to have occurred late on the night of January 16 and early in the morning of January 17, 1969 (A. 6). His trial began on June 23, 1969 (A. 15), and a jury found him guilty of rape on June 25, 1969 (A. 65-66). Under the Missouri Second Offender's Act, §556.280, Mo.Rev.Stat., the Court sentenced him to life imprisonment (A. 66-67, 103-04), and the judgment and conviction were affirmed by the Missouri Supreme Court on January 11, 1971, in an opinion reported at 462 S.W.2d 677 (A. 107-118).

On April 16, 1971, petitioner filed, *pro se*, in the St. Louis Circuit Court his motion under Missouri Rule 27.26 (habeas corpus) to vacate his conviction and sentence (A. 121-27). The counsel appearing here were appointed by the Circuit Court on May 11, 1971, to assist petitioner (A. 4). In his Rule 27.26 motion, petitioner contended: (1) that the trial court had failed to determine whether he was competent to stand trial after his competency was placed in issue and that he was denied his right to a psychiatric examination and hearing to determine his competency to be tried, convicted and sentenced; (2) that he was unconstitutionally tried in absentia while he was hospitalized with a gunshot wound; and (3) that he failed to receive effective assistance of counsel (A. 121, 197).

As is the practice in the St. Louis Circuit Court concerning Rule 27.26 motions, petitioner's motion was assigned to the same judge who presided over his trial

(A. 4). An evidentiary hearing on petitioner's motion was held on July 21, 1971 (A. 4, 128-196). When more than nine months had elapsed after the hearing and the trial judge had yet failed to rule on the motion, petitioner on April 19, 1972, filed a petition for a writ of mandamus with the Missouri Supreme Court requesting that the trial court be ordered to rule promptly on the motion. Finally, on June 26, 1972, eleven months after the hearing, the trial judge overruled petitioner's motion (A. 197).

Petitioner appealed to the Missouri Court of Appeals, St. Louis District (A. 215), which on June 5, 1973, upheld the judgment of the Circuit Court in an opinion reported at 498 S.W.2d 838 (A. 216-25). The Court of Appeals essentially held that the Circuit Court was not clearly erroneous in finding that there was no evidence prior to petitioner's conviction and sentence which gave the trial judge reasonable cause to believe that petitioner was not mentally fit to proceed with trial. Following a denial by the Supreme Court of Missouri of petitioner's application to transfer the case (A. 227), petitioner sought a writ of certiorari in this Court, which was granted on May 13, 1974 (A. 228).

The facts and evidence surrounding petitioner's conviction, as elicited at the trial and the subsequent hearings, will be reviewed chronologically.

Pre-Trial Occurrences

On February 26, 1969, petitioner, together with two other men, was charged with the forcible rape of his wife, Marianne (A. 6). After the incident, which was alleged to have occurred on January 17, 1969, petitioner returned to living with Marianne and his

children at her request. He continued to live with her until they had a quarrel shortly before the trial (A. 45-48, 50-56, 191, 194).

Less than a month after the alleged rape, Marianne, on February 12, 1969, told petitioner's retained attorney (Mr. Watson) that she felt her "husband was sick and needed psychiatric care" (A. 45-46). She further indicated that she did not want to prosecute her husband, and she signed the following written statement:

> "Marianne Drope states that I do not desire to prosecute my husband James Drope on the charge of sodomy of which I complained to the police of the City of St. Louis on the date of January 17th, 1969. My reason for not proceeding with this prosecution is that I believe that my husband is suffering from a mental condition. We have five small children. I further believe if my husband receives treatment for his mental condition from a psychiatrist, that he will be much better off than having been prosecuted for this offense" (A. 45-46, 56-57).

Entertaining serious reservations about petitioner's mental condition, Mr. Watson advised Marianne that he would make an appointment for petitioner to see a psychiatrist and suggested to Marianne that she accompany him. Arrangements were made for petitioner and his wife to see Dr. Joseph Shuman, a psychiatrist, on February 20, 1969. Dr. Shuman conducted only a simple examination taking no more than an hour and a half (A. 129). He did not examine petitioner for the purpose of determining whether he had sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding or whether he had a rational as well as factual understanding of the

proceedings against him. Nor did Dr. Shuman make or attempt to make any findings on these points. Dr. Shuman recommended that petitioner seek psychiatric treatment at Malcolm Bliss Mental Hospital, and he told Marianne that petitioner had mental problems (A. 46).

On February 22, 1969, Dr. Shuman made a written report of this interview in which he noted that petitioner would wring his hands and that he had difficulty in talking because of his marked anxiety. The report traced his troubled childhood and related that petitioner thought "he heard voices after his stepfather died and he also described hearing voices only last January and that he saw a vision of his stepfather and grandmother and, apparently, had a conversation with them" (A. 10). Dr. Shuman further pointed out that petitioner had a difficult time relating and was highly circumstantial and irrelevant in his speech (A. 11). The report concluded:

> "This is a very neurotic individual who is also depressed and perhaps he is depressed for most of the time. Apparently, he certainly has much reason for this. As for the diagnosi I want to offer: (1) Sociopathic personality disorder, sexual perversion. (2) Borderline mental deficiency. (3) Chronic anxiety reaction with depression" (A. 12-13).

After the visit to Dr. Shuman's office, petitioner made several visits to the outpatient clinic at Malcolm Bliss Mental Hospital for treatment (A. 48-49, 194).

Petitioner's case was set on the trial docket for April 14, 1969. On that date, however, he was granted a severance from the other two co-defendants, and trial was continued until May 26, 1969. Petitioner's attorney and the prosecuting attorney in the meantime, however, apparently agreed that petitioner should have a psychiatric examination before he stood trial (A. 16,

19, 181). Accordingly, on May 27, 1969, petitioner's counsel filed a motion for a psychiatric examination reading as follows:

> "Comes now the Defendant, James E. Drope, and states to the Court that he has had a psychiatric examination made by Dr. Joseph F. Shuman, M.D., a copy of which report is attached hereto.
>
> "Defendant moves the court to continue his case until September, 1969, in order that he might receive an Examination, Evaluation and psychiatric treatment as suggested by Dr. Shuman at the Malcolm Bliss Hospital in the City of St. Louis, Missouri" (A. 7)

Attached to the motion was a copy of Dr. Shuman's report. On the same day, the prosecuting attorney filed a memorandum with the court, in effect consenting to the request for a psychiatric examination:

> "Comes now the State of Missouri and does not oppose the motion for a psychiatric examination of the Defendant James E. Drope in the above entitled cause" (A. 8).

On May 29, 1969, petitioner's case was continued to the docket of June 23, 1969, although evidently no actual notice of this was sent to petitioner or his attorney (A. 17). The record is clear that no ruling was ever made on petitioner's motion for a psychiatric examination.

Petitioner discovered only by chance that his trial had been set for June 23 when his wife's stepfather told him a few days before that date that he had received a subpoena to appear as a witness on June 23 (A. 188). Petitioner was unable to locate or contact his attorney, and he did not have an opportunity to consult with his attorney between the time he was

advised of the trial setting and the commencement of the trial (A. 181-82). Petitioner's attorney claimed that he had not been notified and was unaware that the trial was set for June 23, apparently assuming that the motion for a psychiatric examination had been or would be granted or at least that the case would not be set for trial until a ruling was made on the pending motion (A. 15-21).

The Original Trial

Petitioner's attorney, Mr. Watson, failed to appear for the trial on June 23, and the trial judge, obviously irritated, ordered the Sheriff to bring him in. When Mr. Watson finnaly arrived, he apprised the court of his motion for a psychiatric examination filed on May 27 and fervently stated to the court that he had been unaware that the trial had been set for June 23. He stated that he had been informed the case would be carried over to September in order that petitioner could be given a psychiatric examination to determine whether he was fit to stand trial, and that consequently he had not prepared the case for trial (A. 15-17).

The court understood that Mr. Watson had requested a psychiatric examination for petitioner but impatiently noted that since it was not in proper form,[1] "then no Motion has been filed" (A. 16-18). Thereupon Mr. Watson stated that "I am objecting to going to trial with this defendant also for the reason that the

[1] There is no required form for a motion for a psychiatric examination under either Missouri state or St. Louis local procedural rules.

defendant is not a person of sound mind and should have a further psychiatric examination before the case should be forced to trial" (A. 19). The motion was summarily overruled, and examination of the prospective jurors was immediately begun.

Following the finalization of selection of the jury on June 24, the State called Marianne Drope as its first witness against her husband (A. 22). Marianne testified that petitioner participated with four of his acquaintances in forcibly raping her and subjecting her to other aberrational sex acts on the night of January 16, 1969. She stated that she was tied to the bed and while the others took turns raping her, petitioner at times held a gun to her head and at other times held a knife to her throat (A. 26-27). She had been married to petitioner for seven years, and they had five children ranging in age from nine months to six years (A. 22). After the incident she continued to live with petitioner until just prior to the trial (A. 45-48, 50-56). She admitted having abnormal sexual relations with her husband before (A. 47), and she had felt that her husband was mentally sick and in need of psychiatric care (A. 45). For this reason she did not desire to prosecute her husband, and she admitted having so informed petitioner's attorney and having signed a statement to that effect, which was read into the record (A. 45-46).

Marianne testified about accompanying her husband to see Dr. Shuman, and recalled that she told Dr. Shuman that petitioner was sexually perverted and had performed some very unusual sex acts on her. She said that Dr. Shuman had recommended that petitioner undergo treatment at Malcolm Bliss Hospital, "but Jim would not go" (A. 48).

On occasions when petitioner did not get his way or was worried about something, he would roll down the

stairs. When asked if she knew why he behaved in that manner, his wife replied, "the only thing I can tell you is what they told him many times at City Hospital, that is something he does upon hisself" (A. 47-48). She testified that during their marriage, petitioner always had been very nervous but had been even more nervous since the incident of January 16 (A. 48). She said that she changed her mind about not wanting to prosecute petitioner and decided to testify against him when they fought and he tried to choke and kill her on the Sunday evening just prior to the trial (A. 52).

During the cross-examination of Marianne, petitioner's attorney continually raised the question that petitioner had suffered from blackouts and was mentally ill (A. 42-56, 59-61).

The State did not conclude its case on June 24, and when court was convened the next morning the following discussion occurred in the presence of the jury:

> "THE COURT: Good morning, members of the jury. We were delayed through no fault of either the Court or the attorneys in this case. I just want to let you know that. * * * You may proceed.
>
> "MR. WATSON: Your Honor, at this time I am going to move for a mistrial in view of the fact that the defendant, I am informed, shot himself this morning.
>
> "MR. FRANK: Wait—
>
> "MR. WATSON: I am addressing the Court.
>
> "THE COURT: Wait.
>
> "MR. WATSON: The defendant, I understand, shot himself this morning. He is in the City Hospital being operated on.
>
> "THE COURT: Just a minute. The Court already decided that the matter would proceed for trial.

"MR. WATSON: Your Honor, it makes it awful difficult for me to go to trial without the client.

"THE COURT: That is the difficulty, Mr. Watson, that your client brought about, not you, not the Court. He was on bond and his responsibility to be here. So the Court will proceed with the case.

"MR. WATSON: My motion then is overruled, Your Honor?

"THE COURT: Yes" (A. 63).

Although the record is unclear, apparently petitioner's relatives had called the court and had advised the trial judge that petitioner had been found shot in the stomach and had been rushed unconscious to City Hospital, but no hearing or inquiry was conducted to ascertain the facts and circumstances surrounding the shooting, and the trial without hesitation proceeded in petitioner's absence. The State called five more witnesses, introduced evidence of petitioner's prior conviction and rested on that day.[2] At the close of the prosecution's case, petitioner's counsel moved for judgment of acquittal and again stated:

"The Court should have declared a mistrial when Defendant moved for same, when it became apparent that the Defendant shot himself and could not further attend the trial as he is confined as a Patient in the City Hospital of St. Louis No. 1, therefore depriving him of being confronted by his accusers as he is being tried in absentia" (A. 64).

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[2] The Missouri Supreme Court's opinion in the direct appeal, 462 S.W. 2d at 677, erroneously states that after the start of the trial on June 23, the court heard four witnesses on June 29 and then recessed. Actually, the trial commenced on June 23 and ended on June 25 (A. 1-2).

The court summarily overruled both motions. Defense counsel then announced that he had no evidence to present, as the defendant was not available to testify (A. 64). The jury returned a guilty verdict on June 25, 1969 (A. 65-66), and on July 21, petitioner was sentenced to life imprisonment (A. 66-67).

The Hearing on Petitioner's Motion for New Trial

On July 30, 1969, petitioner's attorney filed a motion for a new trial (A. 67-69). A hearing on that motion was held on September 19, 1969 (A. 69). The only issue pursued there was petitioner's absence from the trial. The question of his mental condition at the time of trial was not considered or discussed, and no evidence was presented concerning that question. Petitioner generally testified that he did not remember what happened to him on the morning of June 25, 1969. He had gone to his brother's house on the morning of June 25 to get a change of clothes. He remembered going down into the basement to get his clothes. After getting his clothes he turned the light out and felt a hot burning sensation in his stomach. He remembered nothing after that until he woke up in Homer G. Phillips Hospital several days later (A. 71-73). He was hospitalized for a total of 21 days (A. 146-147).

After petitioner's direct testimony at the hearing, the court, over the vigorous objection of petitioner's attorney, granted the State a two-week continuance until October 3 so that it could gather evidence for cross-examination of petitioner and for its rebuttal (A. 73-76).

At the adjourned hearing on October 3, Patrolman Jerome Dampier, for the prosecution, testified that he received a call around 8:00 or 8:15 a.m. on June 25, 1969, relative to an attempted suicide at 5230 Buliver. He stated that after talking to petitioner's mother at the scene, he drove to the hospital and talked to petitioner's brother, who told the patrolman that petitioner had shot himself in the stomach and that he had taken him to the hospital. Patrolman Dampier stated he also talked to petitioner, who told him that he was supposed to go to court and that "he would rather be dead than to go to trial for something he didn't do. So he got his rifle out of his basement and went to the garage and shot himself" (A. 94-98).

On October 15, the trial court overruled petitioner's motion for a new trial, holding that the burden of proof was on the petitioner to prove that his absence from trial was not voluntary (A. 102-03). Subsequently, on October 21, the court again sentenced petitioner to life imprisonment (A. 103-04).

Petitioner, represented by Mr. Watson, appealed his conviction to the Missouri Supreme Court but did not specifically raise the issue concerning his mental capacity to proceed with the trial. The Supreme Court on January 11, 1971, affirmed petitioner's conviction on the points raised in the appeal (A. 107).

The Hearing on Petitioner's Rule 27.26 (Habeas Corpus) Motion

After petitioner had filed his habeas corpus motion under Missouri Rule 27.26, a hearing was held, at which petitioner called two psychiatrists, his brother, Homer

Case, and his former stepfather, in addition to taking the stand himself. The State called no witnesses and presented no evidence whatsoever to rebut petitioner's case.

Both psychiatrists testified that given the facts and circumstances surrounding petitioner's trial, his behavior before trial and his past medical and psychiatric history, and especially his attempted suicide, there was at least reasonable cause to believe that he was suffering from a mental disease or defect evidencing his unfitness to proceed with his trial and requiring a psychiatric examination (A. 128-43, 149-62).

Dr. Shuman stated that he had examined petitioner sometime in February, shortly after he was alleged to have taken part in raping his wife and four months before his trial, and that he had written the report referred to above. His examination of petitioner consisted of an interview for a period of about 1½ hours and also a short interview with petitioner's wife. He concluded that petitioner was mentally ill and needed institutionalized treatment. He noted that he found him to be an extremely nervous man who was a borderline mental deficient and prescribed a tranquilizer for him (A. 135-41).

Dr. Shuman stated that almost without exception people who attempt suicide are mentally ill and are not acting rationally. He agreed that psychiatrically well (normal) persons never or rarely make suicide attempts, regardless of the severity of the social stresses to which they are subjected, and that any person who threatens suicide is in need of immediate and definitive treatment (A. 132-133).

Dr. Shuman further testified that the fact of petitioner's shooting himself in an apparent suicide attempt during the course of his trial was enough to

raise a reasonable cause to believe that petitioner was not fit to proceed with his trial in that he lacked capacity to understand the proceedings against him or to assist in his own defense (A. 133-138). The following testimony is particularly pertinent:

> "Q. Doctor, based upon your knowledge in the field of psychiatry, your educational and practical background, do you have an opinion as to whether or not a person who attempts a suicide, whether or not that act of attempted suicide would be reasonable cause to believe that one might not be mentally competent at that time to understand, say, the proceedings around him, if he was in the midst of a trial?
>
> * * *
>
> "A. There is reasonable cause.
>
> * * *
>
> "Q. Now, doctor, our statute says that a mental disease or defect sufficient to give rise to a cause here where a man might not be able to understand the proceedings around him, does not mean any type of medical classification, . . . [b]ut it means merely a disorder sufficient to cause the results indicated. We are not talking about any mental disease or defect, psychotic or neurotic, but, in your opinion, a man who attempts a suicide, based on the hypothetical that Mr. Williams just gave you, he has been accused of taking four of his buddies home and raping is wife and standing trial and actually goes to court for one day and hears testimony, comes home and makes an attempt on his life early the following morning. Would that give you reasonable cause, as a psychiatrist, to believe that he might have such a mind that it might not be able to allow him to proceed with the trial?
>
> "A. Yes, that does give reasonable cause" (A. 133-34, 138).

Dr. Jon Tek Lum testified that since 1969 he had been Director of Forensic Services at Malcolm Bliss Mental Health Center, with the duty of examining or supervising the examination of accused persons pursuant to orders of the St. Louis Circuit Court to determine whether or not they are fit to stand trial under Missouri's Mental Responsibility Statute, (A. 150-52).

He noted that petitioner had a history of mental trouble and that he had examined petitioner in 1965 while petitioner was a patient in City Hospital No. 1 and found that he was in need of psychiatric care and treatment (A. 153). Dr. Lum further testified that petitioner should have been accorded a psychiatric examination to determine whether he was fit to proceed with his trial:

> "Q. Doctor, do you have an opinion as to whether or not a person who has just attempted suicide during the course of his trial in which he has been accused of raping his own wife with four of his friends, whether or not he might be in need of psychiatric care?
>
> "A. Yes, I do.
>
> "Q. What is your opinion, doctor?
>
> "A. I feel that a man that has committed an act such as raping his own wife, or allegedly raping his own wife, and then afterwards during the trial, in the process of the trial, makes a suicide attempt is in need of at least a psychiatric evaluation to find out his mental condition (A. 151).
>
> * * *
>
> "I think if a man makes a suicide attempt on his life, shooting himself in the abdomen, I think this is a serious psychiatric indication that the man has a problem and needs to consult with a psychiatrist or should see a psychiatrist. On that basis, people that make suicide attempts, some eighty-five percent of them have a true psychiatric

disorder. Dr. Robins and some of the other people at Washington University found that a lot of these people do in fact suffer from a psychiatric illness and show poor judgment. This suicide attempt, it does indicate poor insight and judgment. They also may have some distortions or irrational thinking, they may be severely depressed, and for these reasons, they should seek the help of a psychiatrist.

"Q. Now, doctor, we don't know whether he was mentally incompetent or not without an examination; is that correct?

"A. That is correct. I couldn't conjecture as to whether he was competent to assist in his own defense.

"Q. These factors in your mind would be a reasonable cause to believe that there might be something that would warrant a psychiatric examination –

"A. Yes" (A. 154).

Dr. Lum pointed out that if petitioner was acting under a mental disorder when he attempted to kill himself, such decision might not have been voluntary and willful (A. 155).

Petitioner himself testified that shortly after the incident of January 17, Marianne asked him to come back and live with her and that they cohabited until about a week before the trial. Because of a mix-up as to his trial date, petitioner was unable to locate or contact his attorney, and he did not have an opportunity to consult with his attorney prior to the trial. He further testified that he remembered nothing about being shot but that his only recollection was waking up in Homer G. Phillips Hospital in a state of confusion. He denied making any statement to the police at the hospital (A. 184-85, 188-89).

The trial court overruled petitioner's motion for post-conviction relief, finding that nothing that occurred before, during or after his trial suggested the necessity or desirability of a psychiatric examination. On appeal, the Missouri Court of Appeals affirmed, holding that the evidence presented at the post-conviction hearing was not before the trial court at the time of trial and that the trial judge could not be imputed with such knowledge. The Court of Appeals concluded that the finding of the trial court regarding defendant's competency was not clearly erroneous.

SUMMARY OF ARGUMENT

This case is squarely ruled by *Pate v. Robinson*, 383 U.S. 375 (1966). At no stage of the proceedings was petitioner accorded a psychiatric examination or a hearing to determine his competency to stand trial, in spite of substantial evidence of a history of mental problems, repeated requests by trial counsel for an examination, admissions by petitioner's wife that he was mentally ill and his attempted suicide during the trial. By any standard, the evidence before the trial court created at least a reasonable doubt of petitioner's competence and compelled a psychiatric examination and a hearing.

Petitioner, on trial for a capital offense, was further denied due process by being tried *in absentia* while in the hospital undergoing emergency surgery after his suicide attempt. Under *Diaz v. United States*, 223 U.S. 442 (1912), he had the absolute constitutional right to be present, physically as well as mentally, during his trial for a capital offense. This right is so fundamental that it cannot be waived. Yet the Missouri courts not

only held that petitioner could waive the right to be present but, without a psychiatric examination or a hearing, determined summarily that his suicide attempt constituted a willful and voluntary waiver of that right.

ARGUMENT

I.

PETITIONER, WHO WAS ON TRIAL FOR RAPING HIS OWN WIFE AND WHO ATTEMPTED SUICIDE DURING HIS TRIAL, WAS ENTITLED UNDER FEDERAL CONSTITUTIONAL LAW TO A PSYCHIATRIC EXAMINATION AND A HEARING TO DETERMINE HIS MENTAL COMPETENCY TO BE TRIED, CONVICTED AND SENTENCED, SINCE THERE WAS EVIDENCE PRESENT WHICH RAISED A REASONABLE DOUBT AS TO HIS COMPETENCE TO STAND TRIAL.

Despite the vigorous and repeated supplications and the substantial evidence before the trial court that petitioner was not mentally fit to proceed with his trial, including the fact of his nearly successful suicide attempt during his trial, no psychiatric examination or hearing to determine his mental competency was ever accorded petitioner at any stage of the proceedings. The trial court did not even pause to inquire about petitioner's competency. The holding of the state appellate court that there was nothing before the trial court which raised a reasonable doubt as to petitioner's competency was induced by expedient myopia, was

squarely contrary to this Court's holding in *Pate v. Robinson*, 383 U.S. 375 (1966), and denied petitioner due process of law.

This Court in *Pate v. Robinson, supra*, plainly held that when there is evidence before the trial court which raises a bona fide doubt as to a defendant's competence to stand trial, the accused under the due process clause of the Fourteenth Amendment is constitutionally entitled to a hearing on the issue of his capacity to proceed.[3] Even if the parties fail to bring the issue to the court's attention by an appropriate motion, the court is obliged to act *sua sponte*. Essentially, *Pate* declared that federal constitutional law, rather than

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[3] Long before *Pate*, it had been a well-established and fundamental precept that the trial of an incompetent defendant violates due process. See, e.g. *Youtsey v. United States*, 97 F. 937, 940 (6th Cir. 1899); *United States v. Chisolm*, 149 F 2d 284, 289-290 (8th Cir. 1906); *Massey v. Moore*, 348 U.S. 105, 108 (1954); *Bishop v. United States*, 350 U.S. 961 (1956); *Dusky v. United States*, 362 U.S. 402 (1960). Conviction while incompetent is tantamount to a denial of the right to be present, to confront one's accusers and to defend oneself, for a defendant must possess sufficient present ability to consult with his attorney and have a rational as well as a factual understanding of the proceedings in order to make his "presence" at trial meaningful. *Negron v. New York*, 434 F.2d 386, 389 (2d Cir. 1970); Note, "Incompetency to Stand Trial," 81 Harv. L. Rev. 454, 458 (1967). *Pate*, however, recognized and raised to constitutional proportions the additional right of a defendant to an adequate hearing on his competency to stand trial whenever a bona fide doubt as to that issue exists. *Pate* properly noted that such a hearing is a crucial and indispensable safeguard to insure that an accused whose mental fitness is in doubt is not tried and convicted while incompetent.

state law, governs a defendant's right to a hearing on his competency to stand trial.[4] The test of competency to stand trial was outlined by this Court in *Dusky v. United States*, 362 U.S. 402 (1960):

> "It is not enough . . . that the defendant is oriented to time and place and has some recollection of events . . . the test must be whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding–and whether he has a rational as well as factual understanding of the proceedings against him."

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[4] Missouri, before this Court's decision in *Pate*, recognized the the common-law prohibition against the conviction of all incompetent accused and enacted a statutory scheme designed to protect against such an occurrence. The Missouri statute §552.020, which is that reproduced in Addendum A, *infra*, provides, *inter alia*, that *whenever*-- at any stage of the proceedings--any judge has reasonable cause to believe that the accused has a mental disease or defect excluding fitness to proceed, he *shall* upon his own motion or motion of the prosecution or the accused *order a psychiatric examination*, and if the results of the psychiatric report are contested, a hearing must be held. The Missouri statute *conclusively presumes*, therefore, that the court requires the aid of medically and psychiatrically trained persons in order to make a meaningful determination as to a defendant's competency and recognizes that a psychiatric examination is an essential prerequisite to an informed hearing. But, as observed in *Kibert v. Peyton*, 383 F.2d 566, 569 (4th Cir. 1967), this type of statute will work only if it is used:

> " 'What emerges from this humane legislation is the assurance . . . .that one whose mental capacity to cope with the exigencies of a trial is in doubt shall not be put in jeopardy without a preliminary inquiry into his present mental condition.'
>
> "The protection afforded the defendant by the legislation is illusory, however, if, when a reasonable doubt as to his sanity arises, neither court nor counsel seeks to utilize the procedures provided by the state for determining competency."

The issue presented here, then, is whether the Missouri courts applied the law as prescribed in *Pate*, and whether there were facts and evidence present before the trial court which raised a reasonable doubt as to petitioner's competency entitling him to a psychiatric examination and a hearing.

As is often the case, legal principles such as those announced by the Court in *Pate* are more easily explicated than applied. Difficulty of application or dissatisfaction with the immediate consequences, however, cannot justify a denial of due process. The Missouri courts which dealt with petitioner's case paid lip service to the precepts of *Pate*, but wholly failed to implement its teachings. *Pate* cannot be meaningfully or materially distinguished, either legally or factually, from this case.[5] If anything, the evidence before the trial court in the instant matter raised a more substantial doubt about petitioner's ability to participate effectively in his trial than did the evidence in *Pate*.

The Missouri Court of Appeals struggled vainly to distinguish *Pate* by reference to what it termed "extensive" facts before the trial court there which

[5] The similarities between the two cases are interesting. In *Pate*, defendant Robinson, like petitioner, was attacking his conviction by way of habeas corpus. He had been convicted of the murder of his common-law wife by an Illinois court and sentenced to life imprisonment. Robinson had contended on appeal to the Illinois Supreme Court that the trial court erred in failing to hold a hearing to determine whether he lacked mental competency to stand trial. The Illinois Court, however, found that neither Robinson nor his attorney had requested a hearing on his mental competency to stand trial, and, like the Missouri Court of Appeals below, found that the evidence had failed to raise sufficient doubt as to his competency to require the trial court to conduct a hearing. *People v. Robinson*, 174 N.E. 2d 220 (1961). Robinson's case later reached this Court after being processed through the federal system, whereas petitioner's came directly from the state courts.

required a hearing, emphasizing the following evidence in *Pate*:

> "(1) Robinson was hit by a brick by a child and thereafter acted 'peculiar'; (2) he had episodes of sudden, unexplained violence toward objects and people; (3) he would have frequent dazes and unresponsive periods; (4) he was taken to a state hospital after an episode of violence and was found to be hallucinating and thought someone was after him; (5) he shot and killed his 18 month old son, then shot himself in the head, and then tried suicide by jumping in a lagoon; (6) he killed his common-law wife by walking into her place of employment, stared at her for about a minute and then shot her and another man."[6]

The Missouri court, however, either failed to recognize and consider or sought to minimize evidence and facts before the trial court below which were just as extensive and even more contemporaneous and pronounced. The trial judge was apprised of the following developments:

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[6]The Missouri Court of Appeals also appeared to attach significance to the fact that the petitioner's counsel in requesting a psychiatric examination never invoked the precise expression that "petitioner was unable to cooperate with him." The record, however, shows that petitioner's attorney did everything but recite the "magic words". He filed a written motion for a psychiatric examination attaching thereto Dr. Shuman's report (A. 7-13); he obtained the State's agreement not to oppose the motion (A. 14, 16, 19); he vigorously protested to the court that petitioner was not of "sound mind" to stand trial (A. 15-21).

In any event, this Court in *Pate*, rejected the requirement of precision in pleading (see 383 U.S. at 384-85, n.6) and categorically held that the defense of incompetency to stand trial cannot be waived by the incompetent; and it ineluctably follows that his counsel cannot waive it for him by failing to assert that right. *Kibert v. Peyton*, 383 F.2d 566 (4th Cir. 1967).

(1) Petitioner was charged with the deranged act of holding a gun to his wife's head and a knife to her throat while assisting four others to rape and commit sodomy on his wife, a crime so rare that no other comparable case appears in the annals of Missouri case law (A. 26-32).

(2) A month after the crime, petitioner's attorney harbored enough reservations about petitioner's sanity that he secured an appointment for him with a psychiatrist (A. 45-46).

(3) Petitioner's wife told his attorney that she felt her husband was mentally sick and needed psychiatric care, and signed a statement saying she did not want to prosecute him because she thought he was mentally ill and should receive psychiatric treatment (A. 45-47).

(4) Dr. Shuman, who had interviewed petitioner four months prior to trial, found that he was notably agitated and upset, and that he had problems with his memory and had difficulty in participating with the doctor during the interview. (A. 11). He further found that petitioner had a difficult time relating and was markedly circumstantial and irrelevant in his speech. Dr. Shuman's diagnosis was that petitioner was suffering from borderline mental deficiency, a sociopathic personality disorder, and chronic anxiety reaction with depression (A. 12). Dr. Shuman concluded that petitioner was mentally ill and needed psychiatric treatment.

(5) Petitioner's attorney, after receiving Dr. Shuman's report, filed a written motion requesting a court-ordered psychiatric examination to determine petitioner's competency to proceed with trial, and attached thereto Dr. Shuman's report (A. 7-13).

(6) The prosecutor apparently agreed that petitioner should be accorded a psychiatric examination and filed a memorandum, evidencing his consent thereto (A. 14, 16, 19).

(7) Petitioner's attorney throughout the trial continued to place in issue petitioner's competency, and on the first day of the trial he fervently and vigorously pleaded with the court to grant a psychiatric examination (A. 15-21). At one point in open court, petitioner's attorney protested: "I am objecting to going to trial with this defendant also for the reason that the defendant is not a person of sound mind and should have a further psychiatric examination before the case should be forced to trial" (A. 19).

(8) Petitioner's wife testified that on occasions when he did not get his way or was worried about something, he would roll down the stairs. She did not know the reason for this behavior but "the only thing I can tell you is what they told him many times at City Hospital, that is something he does upon hisself" (A. 47).

(9) During the course of cross-examination of petitioner's wife, his attorney continually raised the question of petitioner's mental competency (A. 42-56, 59-61).

(10) After the second day of his trial, petitioner attempted to kill himself and spent 21 days in the hospital recuperating.

Furthermore, in *Pate*, the parties had stipulated at trial that two or three months before trial, the defendant Robinson had been examined by a psychiatrist who had *specifically found* that he knew the nature of the charge against him and was able to cooperate with his counsel in the defense of that charge. Here, however, not only was no such finding

ever made, but on the contrary, Dr. Shuman concluded that petitioner was mentally ill and needed psychiatric treatment. Most of the irrational acts and behavior on the part of Robinson had occurred years before the trial, and Robinson at trial displayed mental alertness as well as an understanding and knowledge of the proceedings. He actually discussed the proceedings and his defense with the court in an intelligent manner.[7] By contrast, petitioner's disordered mind was dramatically manifested during trial when he attempted to kill himself.

Even the dissenting opinion by Mr. Justice Harlan in *Pate* supports the reversal of petitioner's conviction. The dissent took issue with the majority holding that the evidence presented to the trial court was sufficient to raise a bona fide doubt as to Robinson's competency. But Mr. Justice Harlan conceded that if one of Robinson's moments of deranged behavior had occurred at trial, a bona fide doubt would have arisen, necessitating a hearing. Hence, the prerequisites of even the *Pate* dissent were met here when petitioner displayed his severe mental instability by attempting to end his life.

Petitioner is not asking this Court to formulate new guidelines dealing with the problems of mental fitness to stand trial; rather he is simply seeking to avail himself of his constitutional entitlements under well established principles and previous decisions of this Court. It is unnecessary for the Court to break new constitutional ground in this case, for under the

[7] See the opinion of the Illinois Supreme Court at 174 N.E. 2d 820, 823. This Court in *Pate*, however, held that "While Robinson's demeanor at trial might be relevant to the ultimate decision as to his sanity, it cannot be relied upon to dispense with a hearing on that very issue." 383 U.S. at 386.

uncontroverted facts and circumstances cognizable to the trial judge there can be no serious contention that petitioner's competency was free from doubt.

The Missouri Court of Appeals abdicated its constitutional responsibilities in this case by rubber stamping the findings of the trial court as not "clearly erroneous." In determining whether there is "reasonable doubt," reviewing courts should apply an objective standard, rather than a subjective one. The question for resolution is whether, based on the facts and circumstances known to the trial judge, a reasonable man should have entertained a reasonable doubt about the defendant's fitness to stand trial. As the Ninth Circuit explained in *Rhay v. White*, 385 F.2d 883, 886 (1967):

> "[T]he question here is not why counsel failed to request a competency hearing or why the court failed to hold one on its own initiative, but whether, no less on hindsight than by foresight, there were elements of such indication in the situation as, if proper notice had been taken of them, could present a substantial question of possible doubt as to [the defendant's] competency to stand trial."

Once the trial judge is confronted by facts indicating the existence of a doubt as to a defendant's mental capacity, he cannot, on his own, sift and filter the various conflicting factors to conclude that the weight of the evidence points to competency. The court must not decide the ultimate issue without affording the accused a psychiatric examination and a right to a hearing. We are hard-pressed to improve on the procedural analysis of the Ninth Circuit in *Moore v. United States*, 464 F.2d 663, 666 (1972):

> "Under the rule of *Pate v. Robinson* (1966) 383 U.S. 375, 86 S.Ct. 836, 15 L.E.2d 815 a due

process evidentiary hearing is constitutionally compelled at any time that there is 'substantial evidence' that the defendant may be mentally incompetent to stand trial. 'Substantial evidence' is a term of art. 'Evidence' encompasses all information properly before the court, whether it is in the form of testimony or exhibits formally admitted or it is in the form of medical reports or other kinds of reports that have been filed with the court. Evidence is 'substantial' if it raises a reasonable doubt about the defendant's competency to stand trial. *Once there is such evidence from any source, there is a doubt that cannot be dispelled by resort to conflicting evidence.* The function of the trial court in applying *Pate's* substantial evidence test is not to determine the ultimate issue: Is the defendant competent to stand trial? Its sole function is to decide whether there is any evidence which, assuming its truth, raises a reasonable doubt about the defendant's competency. At any time that such evidence appears, the trial court *sua sponte* must order an evidentiary hearing on the competency issue. It is only after the evidentiary hearing, applying the usual rules appropriate to trial, that the court decides the issue of competency of the defendant to stand trial."[8]

In the case at bar, the Missouri Court of Appeals has taken an impermissibly narrow and unconstitutionally circumscribed view of what evidence raises a reasonable or bona fide doubt of an accused's competency.[9] It

[8] Emphasis ours here and throughout this brief except as otherwise noted.

[9] Contrast the Court of Appeals' decision with the following decisions which found the existence of a reasonable doubt on similar or less substantial grounds: *Bruce v. Estelle*, 483 F.2d 1031 (5th Cir. 1973); *Moore v. United States*, 464 F.2d 663 (9th Cir. 1972); *White v. United States*, 470 F.2d 727 (5th Cir. 1972); *Negron v. New York*, 434 F.2d 386 (2d Cir. 1970); *Carroll v. Beto*, 421 F.2d 1065 (5th Cir. 1970) *cert. denied* 405

strains credulity to assert that the facts before the trial court, when weighed together, generated no serious misgivings as to petitioner's competency. The Missouri appellate court, in a palpably result-oriented opinion, refused to consider and weigh all of the evidence together as a whole, but unjustifiably splintered and fractionated certain aspects of the evidence for examination in a vacuum, in isolation from the others.[10]

Such an approach is not only illogical but legally defective, as held in *Moore v. United States, supra* at 666;

> "We need not decide whether the psychiatric report of December 30, 1967, standing alone, constituted substantial evidence that Moore was incompetent to stand trial. *It did not stand alone.* By the time Moore's guilty plea was taken, the reports from the Federal Bureau of Prisons were in his file. Those reports together with the report of December 30, 1967, constituted substantial evi-

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U.S. 1030 (1972); *Clonch v. Boles,* 419 F.2d 393 (4th Cir. 1969); *United States v. Silva,* 418 F.2d 328 (2d Cir. 1969); *Clark v. Beto,* 415 F.2d 71 (5th Cir. 1969); *Morris v. United States,* 414 F.2d 258 (9th Cir. 1969); *Reed v. United States,* 391 F.2d 4 (9th Cir. 1968); *Rhay v. White,* 385 F 2d 883 (9th Cir. 1967); *Kibert v. Peyton,* 383 F.2d 566 (4th Cir. 1967); *Hansford v. United States,* 365 F.2d 920 (D.C. Cir. 1965); *Jacobs v. United States,* 350 F.2d 571 (4th Cir. 1965); *Dickey v. United States,* 345 F.2d 508 (5th Cir. 1965); *Taylor v. United States,* 282 F.2d 16 (8th Cir. 1960); *Kenner v. United States,* 286 F.2d 208 (8th Cir. 1960); *State v. Davis,* 480 P.2d 354 (Ariz., 1971); *State v. Mahaffey,* 478 F.2d 787 (Wash., 1971).

[10]For example, the Missouri court stated that "We are unable to conclude that as a matter of law an attempt at suicide creates a reasonable doubt as to movant's competency to stand trial." As is manifested by its opinion, the Missouri court made no effort to consider the suicide attempt in light of all of the other evidence, including the statements of petitioner's attorney that the petitioner was not of sound mind to stand trial, the testimony of petitioner's wife and Dr. Shuman's report.

dence casting a reasonable doubt upon Moore's competency to stand trial *as a matter of law*."

Even if it be assumed *arguendo*, however, that prior to petitioner's suicide attempt there was insufficient evidence before the court to raise a reasonable doubt as to his mental fitness, certainly the demented act of attempted self-destruction, in light of and combined with the other evidence, created reasonable doubt *per se* as to petitioner's mental competency (not to mention his physical ability) to proceed with his trial. In fact, it is suggested that petitioner's suicide attempt, standing alone, raised a reasonable doubt and required a psychiatric examination and a hearing.[11]

Suicide or attempted suicide, itself, is substantial evidence of a disordered and confused mind.[12] At the

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[11]The responsibility of the court to guard against the possibility that an accused may have become or may be incompetent does not end when the trial begins. *Pate v. Robinson, supra; Hansford v. United States*, 365 F.2d 920, 925 (D.C. Cir. 1966); *McClain v. Beto*, 328 F. Supp. 636 (N.D. Tex., 1970), *aff'd* 441 F.2d 703 (5th Cir. 1971).

[12]A study by five St. Louis psychiatrists of 134 successful suicides conclude that 94 percent of those persons could be considered psychiatrically ill. E. Robins, E. Murphy, R. H. Wilkinson, Jr., S. Gassner and J. Kaynes, "Some Clinical Considerations in the Prevention of Suicide Based on a Study of 134 Successful Suicides", 49 *American Journal of Public Health*, 888 (1959). Doctors Robert Litman and Norman D. Tabachnick, psychiatrists at the University of Southern California, observe in an article entitled "Psycho-analytic Theories of Suicide", published in *Suicidal Behaviors*, p. 74 (H.C.P. Resnick ed. 1968) that:

> "The final suicidal act is nearly always preceded by a period of increasing psychological crises and emotional conflict during which the potential victim is consciously ambivalent, "mixed up", and confused as he tries to

hearing on petitioner's Rule 27.26 motion, two psychiatrists testified that the fact of attempted suicide alone was enough to call for a psychiatric examination to determine petitioner's mental state. Dr. Shuman stated that in almost every instance, people who attempt suicide are irrational and in need of immediate and definite psychiatric treatment (A. 132-133). Dr. Lum testified that 85 percent of those persons who are bent on self-destruction have true psychiatric disorders and show poor insight and judgment. He further stated that it is likely that such persons are having distortions of reality and irrational thought processes (A. 154). It does not take psychiatric training, however, to enable one to conclude that an attempt at self-destruction is symptomatic of a sick mind. Unquestionably, there was reasonable doubt as to petitioner's competency to participate in his trial with the necessary degree "of rational as well as factual understanding of the proceedings against him". *Dusky, supra* at 402.

Based on the results of this case, one must wonder aloud what type of behavior could ever cause the Missouri courts to doubt a defendant's sanity. This case borders perilously close to being a travesty of justice. It is evident from the record that the trial judge, upset and angry over petitioner's attorney's failure to appear on the morning the case was assigned for trial, allowed his impatience to close his mind to the facts before him and to ignore the repeated exhortations of petitioner's

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control and resist the largely unconscious fantasies and drives which push him toward self-destruction."

And another study by three St. Louis psychiatrists concluded that "Psychiatrically well (normal) persons never or very rarely make suicide attempts, regardless of the severity of the social stresses to which they are subject." E. Robins, E.H. Schmidt and P. O'Neal, "Some Interrelations of Social Factors and Clinical Diagnosis in attempted suicide: A Study of 109 Patients," 114 *American Journal of Psychiatry* 221, 230 (1957).

attorney that petitioner was not competent to stand trial.[13] Since petitioner has been denied his constitutional right to a psychiatric examination and hearing, *Pate* dictates that his judgment of conviction and sentence must be vacated and he must be discharged from custody, unless the State gives him a new trial within a reasonable time.[14]

II.

PETITIONER, ON TRIAL FOR A CAPITAL OFFENSE, WAS DENIED DUE PROCESS BY BEING TRIED AND CONVICTED IN ABSENTIA AFTER HE ATTEMPTED SUICIDE DURING THE COURSE OF HIS TRIAL.

Petitioner's trial began late during the day of June 23, 1969, with commencement of the selection of the jury. On June 24, the jury was finally impaneled, and the prosecution called four witnesses before adjornment that evening. Early the next morning, petitioner was found lying in the back yard of his step-brother's home suffering from a serious gunshot wound of the stomach. He was rushed unconscious to the hospital and underwent surgery that morning, and was again operated on a few days later. In all, he was hospitalized for a total of 21 days (A. 143-48).

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[13]"Constitutional protections are not reserved for good people and denied to bad, nor does competence to stand trial go by the board because the crime charged is serious." *Tyler v. Beto*, 391 F.2d 993, 1003 (5th Cir. 1968).

[14]See also, *Moore v. United States*, *supra* at 666-67; *Clonch v. Boles*, *supra* at 394; *Rhay v. White*, *supra* at 886; *Hansford v. United States*, *supra* at 925-26.

The trial judge was notified within an hour after petitioner was found wounded, but over the strenuous objection of defense counsel, the trial proceeded without the presence of petitioner. The court did not even grant a recess to permit counsel to talk with petitioner's relatives who found him unconscious or to enable him to confer with his client at the hospital. No hearing or even informed inquiry was held to determine the circumstances surrounding the near-fatal shooting of petitioner or to determine whether he had consciously waived his right to be present. The court ordered the trial to proceed forthwith, and the prosecution called four more witnesses, in addition to producing proof of petitioner's prior conviction. At no time was petitioner present to confront these witnesses or to confer with his counsel; nor, of course, did he have an opportunity to take the stand to testify in his own defense.

A. PETITIONER, WHO WAS ON TRIAL FOR AN OFFENSE PUNISHABLE BY DEATH, COULD NOT BE TRIED IN ABSENTIA AND WAS INCAPABLE OF WAIVING HIS RIGHT TO BE PRESENT AT TRIAL.

Before embarking upon a consideration of whether petitioner effectively and competently waived his right to be present at his trial, the threshold question which must be examined is whether in a capital case that right is even waivable. It is submitted that basic principles of constitutional law, as construed and administered by this Court, demand the conclusion that the right of a defendant accused of an offense punishable by death to be present at his trial is so fundamental that it cannot be waived.

The right to be present, to defend oneself, and to confront one's witnesses is scarcely less important than the right of trial itself. It is well-settled that the confrontation clause of the Sixth Amendment is applicable to the States through the Fourteenth Amendment. *Pointer v. Texas,* 380 U.S. 400 (1965). In *Pointer,* the Court had the following pertinent observations, *l.c.* 405:

> "[T]here are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal."

And in *Illinois v. Allen,* 397 U.S. 337, 338 (1970), it was stated: "[o]ne of the most basic of the rights guaranteed by the confrontation clause is the accused's right to be present in the courtroom at every stage of his trial."

Like most rights, the right to be present may ordinarily be waived – *but not in capital cases. Illinois v. Allen, supra; Diaz v. United States,* 223 U.S. 442 (1912); *Cureton v. United States,* 396 F.2d 671 (D.C. Cir. 1968); *Near v. Cunningham,* 313 F.2d 929, 931 (4th Cir. 1963). The principle has been stated thusly: "The defendant's right to be present during the trial on a capital offense has been held to be so fundamental that it may not be waived by defendant's voluntary absence".[15] This Court, in particular, has long recog-

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[15]Comments of The Advisory Committee on the 1973 Amendments to the Federal Rules of Criminal Procedure upon the suggested revision of Rule 43, as quoted in 8A *Moore's Federal Practice* ¶43.02, at p. 43-44 (2d ed. 1972). Although this case was tried in a state court and the Federal Rules are not controlling, Rule 43 is significant as a codification of existing law. In substance, it dictates that a defendant may not waive his presence in a prosecution for an offense punishable by death.

nized that an accused on trial for a capital offense is not permitted under the law to waive his right to be present at his trial. In *Diaz v. United States, supra* at 445, it was held:

> "In cases of felony our courts, with substantial accord, have regarded [the right to be present] as extending to every stage of the trial, inclusive of the impaneling of the jury and the reception of the verdict, and as being scarcely less important to the accused than the right of trial itself. *And with like accord they have regarded an accused* who is in custody and one *who is charged with a capital offense as incapable of waiving the right;* the one, because his presence or absence is not within his own control, and the other *because, in addition to being usually in custody he is deemed to suffer the constraint naturally incident to an apprehension of the awful penalty that would follow conviction.*[16]

Even before *Diaz*, the Court had uniformly ruled that in trials for offenses punishable by death the presence of the accused is a non-waivable prerequisite. In *Hopt v. Utah*, 110 U.S. 574 (1883); *Lewis v. United States*, 146 U.S. 370 (1892); and *Ball v. United States*, 140 U.S. 118 (1891), the accused was being tried for a capital offense, and in each instance this Court reversed the conviction because the defendant was absent during a part of his trial. It is noteworthy that the absence of the defendant in those cases was not nearly as prejudicial as petitioner's absence from his trial. Unlike the situation in the case at bar, where petitioner was physically incapacitated and missed the testimony of

[16]Most recently in *Taylor v. United States*, 414 U.S. 17, 19 (1973), this Court reiterated the rule that a defendant on trial for a capital offense was incapable of waiving his right to be present.

five witnesses, in addition to the proof of a prior offense, the charge to the jury, closing arguments, the receipt and announcement of the verdict and the polling of the jury, the defendant in each of the above cases was absent during only a brief period of the trial, and in no instance was any testimony taken without his presence.[17] This Court has *never* upheld a conviction of an accused on trial for a capital offense who has been absent during a major part of his trial.[18]

In addition to the rulings of this Court, the non-waivability of the right to be present has been

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[17]In *Hopt* and *Lewis* the defendant was absent during the challenge of proposed jurors; in *Ball* there was no record of defendant's presence when sentence was pronounced.

[18]*Frank v. Mangum*, 237 U.S. 309 (1915), sustained a conviction for murder where the defendant was absent during the reading of the verdict. The Court held that the Georgia practice of authorizing a defendant to waive his right to be present for the rendition of the verdict, was not unconstitutional. It reasoned that "since that state may, without infringing the Fourteenth Amendment, abolish trial by jury," it may allow a defendant to waive his right to hear the verdict, which "is but an *incident* of the right of trial by jury." However the underpinnings of the *Mangum* decision were dislodged by *Duncan v. Louisiana*, 391 U.S. 145 (1968), which held that a trial by jury in criminal cases is a fundamental federal constitutional right which cannot be abolished by the states.

In *Snyder v. Massachusetts*, 291 U.S. 82 (1934), the Court affirmed the murder conviction of a defendant who was not present when the jury viewed the scene of the crime. The Court adhered to its view that an accused has a fundamental right to be present at his trial, but held that a view of the scene of the crime is not a part of the "trial" in the common-law sense.

consistently acknowledged by the state and lower federal courts.[19]

Petitioner was on trial for the offense of rape, which was punishable by death,[20] and the state had not waived the death penalty. He thus bore the "constraint naturally incident to an apprehension of the awful penalty that would follow conviction." *Diaz v. United States, supra* at 455. In trying and convicting petitioner *in absentia*, the Missouri courts stripped him of one of his most fundamental constitutional guarantees.

B. NO MEANINGFUL DETERMINATION WAS MADE THAT PETITIONER VOLUNTARILY AND WILLFULLY ABSENTED HIMSELF FROM TRIAL OR THAT HE COMPETENTLY AND EFFECTIVELY WAIVED HIS RIGHT TO BE PRESENT.

The trial court not only erred by holding that petitioner *could* waive his right to be present, but it

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[19]*Near v. Cunningham*, 313 F.2d 929, 931 (4th Cir. 1963) (which held that "So fundamental is this right that it may not be waived "); *Glouser v. United States*, 296 F.2d 853, 855 (8th Cir. 1961); *Parker v. United States*, 184 F.2d 488, 489 (4th Cir. 1950); *Lee v. Alaska*, 509 P.2d 1088, 1090 (Alaska 1973); *Trombley v. Langois*, 163 A.2d 25, 28 (R.I. 1960); *Blackburn v. State*, 109 So.2d 738, 743 (Ala. 1959); *Berness v. State*, 83 So.2d 607, 611 (Ala. 1953); *Commonwealth v. Ashe*, 70 A.2d 625, 629 (Pa. 1950); *Commonwealth v. Johnson*, 35 A.2d 312, 313 (Pa. 1944); *Commonwealth v. Ashe*, 26 A.2d 211, 212 (Pa. 1942); *People v. La Barbera*, 8 N.E.2d 884 (N.Y. 1937); *Blagg v. State*, 254 P. 506, 508 (Okla. 1927); *State v. Reed*, 210 P. 756. 757 (Mont. 1922).

[20]Petitioner's trial took place in 1969, prior to *Furman v. Georgia*, 408 U.S. 238 (1972). Section 559.260, Mo.Rev.Stat. (set forth in Addendum C, *infra*), provides that every person who shall be convicted of rape shall suffer death, or be punished by imprisonment in the penitentiary for not less than two years.

compounded its disdain for the Constitution by summarily determining, without any evidence, that petitioner's suicide attempt constituted *per se* a voluntary waiver of that right.

When the trial court perfunctorily refused to grant a mistrial or a continuance and decided to proceed with the trial, it held no hearing and made no inquiry whatsoever concerning whether petitioner voluntarily and intelligently intended to relinguish his right to be present. The court was cognizant of petitioner's past psychiatric history, his severe states of depression and anxiety, Dr. Shuman's report, the signed statement and testimony of petitioner's wife that he was mentally sick and needed psychiatric treatment, his attorney's repeated requests for a psychiatric examination of petitioner and his statements that petitioner was not mentally competent to be tried. In addition, the court had been informed of petitioner's suicide attempt and the fact that he was at that very time undergoing emergency surgery (A. 63). Three months after the trial, on petitioner's motion for new trial, the court conducted a hearing regarding petitioner's absence but *not even then did it inquire into petitioner's mental competency to make an intelligent and voluntary waiver.*

To protect and preserve the fairness of the trial process, this Court has imposed strict standards for the determination of whether there has been a waiver of critical trial rights. "Waiver" is equated with "an intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).[21] A waiver of a fundamental constitutional

[21]See also *Boyd v. Dutton*, *405 U.S. 1 (1972)*; *Brookhart v. Janis*, 384 U.S. 1 (1966); *Glasser v. United States*, 315 U.S. 60 (1942).

right can only be competent and effective if it is made not only voluntarily and willfully, but also "knowingly" and "intelligently." *Johnson v. Zerbst, supra.* Most recently, the Court in *Schneckloth v. Bustamonte,* 412 U.S. 218 (1973), reaffirmed its adherence to the *Johnson v. Zerbst* standard in examining waivers of critical trial guarantees: "The Constitution requires that every effort be made to see to it that a defendant in a criminal case has not *unknowingly* relinquished the basic protections that the Framers thought indispensable for a fair trial." *Schneckloth, supra* at 242.

Unquestionably, the right to be present at one's trial, as noted above, is a fundamental constitutional guarantee which is crucial to due process. Even assuming, *arguendo,* that it is susceptible of waiver in a case of this type, such a waiver can be effective only if it is the product of a knowing, intelligent and voluntary choice. Hence, the *Johnson v. Zerbst* standard is fully applicable to determinations with respect to the waiver of that right. *Illinois v. Allen,* 397 U.S. 337, 343 (1970); *Wade v. United States,* 441 F.2d 1046, 1049 (D.C. Cir. 1971); *United States v. Crutcher,* 405 F.2d 239, 243 (2d Cir. 1968), *cert. denied,* 394 U.S. 908 (1969); *Evans v. United States,* 284 F.2d 393, 395 (6th Cir. 1960).

A "knowing" and "intelligent" relinquishment presumes that a person is aware of and understands the right he is discarding, and has a "sufficient awareness of the relevant circumstances and likely consequences." *Brady v. United States,* 397 U.S. 742, 748 (1970). "Voluntariness," as recognized by the Court in *Schneckloth,* is difficult of precise definition, but it undeniably connotes the exercise of one's own "rational intellect and free will." *Deese v. United States,* 303 F.Supp. 619, 622 (D.S.C. 1969). A "voluntary" act

necessarily assumes "capacity for conscious choice." *Schneckloth, supra* at 224. Thus, in order for an act to be "voluntary," the individual must be acting free from coercion, mental as well as physical, must be unhampered by mental defects which might impair his ability to exercise his will freely, and must possess the necessary mental capacity for conscious choice.[22]

A waiver of rights cannot be considered voluntary if it is made by a person whose mental condition prevents a knowing, intelligent and meaningful act of volition. This seemingly obvious principle was elucidated in *United States v. Silva*, 418 F.2d 328, 330 (2d Cir. 1969):

> "A confession or waiver of rights cannot be termed voluntary if it is made by a person whose mental condition at the time was such that 'the confession most probably was not the product of any meaningful act of volition.' . . . Once it becomes apparent that the accused's mental condition is a factor that ought to be looked into in relation to the admissibility of his confession, the trial judge must hold a hearing at which relevant evidence may be offered, including the testimony of experts from which the court will decide whether the accused was at the time he confessed so mentally ill that he was unable, with intelligence, knowledge and understanding, to relinquish or abandon a known right or privilege which was his, or whether 'the confession most probably was not the product of any meaningful act of volition'. If it is found that either of these things is so, the confession must be excluded."

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[22]This Court most recently in *Schneckloth, supra* at 227, observed that "the state of the accused's mind" was "certainly" a factor to be evaluated in assessing the "voluntariness" of his actions.

See also, *Pate v. Robinson, supra; Westbrook v. Arizona,* 384 U.S. 150 (1966); *Blackburn v. Alabama,* 361 U.S. 199 (1960).

Neither the trial court, the Missouri Supreme Court on direct appeal, nor the Missouri Court of Appeals in the habeas corpus appeal analyzed petitioner's absence from trial in the light of his mental condition. Yet, the events that transpired before and during petitioner's trial are inextricably intertwined with the issue of his mental capacity to stand trial in the first place. As pointed out above, studies have shown that persons who attempt to take their lives are suffering from severe states of depression impairing their judgment and rationality. In all probability, the mental condition which spawned petitioner's suicide attempt precluded him from making an intelligent, knowing and voluntary decision to absent himself from his trial. At the very least, that probability should have been the subject of meaningful inquiry by the Missouri courts, and before a waiver could be found, there must have been a *clear showing* that petitioner was capable of making a reasoned choice. *Cureton v. United States,* 396 F.2d 671, 676 (D.C. Cir. 1968); *Cross v. United States,* 325 F.2d 629, 631-33 (D.C. Cir. 1963); *United States v. Tortora,* 464 F.2d 1202 (2d Cir. 1972). No court has yet addressed itself to that task.

If petitioner sought to avoid trial, he could have fled the jurisdiction or simply have concealed himself. A bus ride to Potosi would have accomplished the desired result much less painfully than the means chosen. Self-destruction, to a sane person, would seem to be a bit drastic. In view of the entire record of abnormal behavior, no informed determination could have been made as to the voluntariness *vel non* of petitioner's

absence without a psychiatric examination and hearing to determine his mental competency.

The trial court further ignored established constitutional principles by *presuming* that petitioner's absence was voluntary and by imposing the burden upon petitioner to prove otherwise.[23] This *presumption*, which was blessed by the state appellate courts, is wholly repugnant to the requisites of due process. Such a holding defies this Court's teachings that "courts indulge every reasonable presumption against waiver of fundamental constitutional rights and . . . do not presume acquiescence in the loss of fundamental rights." *Johnson v. Zerbst, supra* at 464. The presumption against waiver is applicable to the right to confrontation, *Barber v. Page*, 390 U.S. 719 (1968); *Brookhart v. Janis*, 384 U.S. 1 (1966); and to the right to be present. *Illinois v. Allen, supra; Wade v. United States, supra; United States v. Crutcher, supra; Cross v. United States, supra; Evans v. United States, supra.*

The courts below reversed the presumption and then penalized petitioner for failing to sustain a burden of proof which should not have been his to bear. Under the circumstances, the trial court's finding that petitioner voluntarily absented himself for the purpose of avoiding trial was absolutely meaningless.

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[23]See colloquy between petitioner's attorney and the court at pp. 74-75 of the Appendix, and the trial court's ruling on petitioner's motion for a new trial at pp. 102-103.

CONCLUSION

For the reasons stated herein, the judgment of the Missouri Court of Appeals should be reversed and the cause remanded with directions to vacate the conviction and sentence of petitioner and to discharge him from custody unless he is accorded a new trial within a reasonable time.

Respectfully submitted,

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ADDENDUM A

552.020. Lack of mental capacity bar to trial or conviction—psychiatric examination, when, report of —commitment to hospital, when—statements of accused inadmissible, when.—1. No person who as a result of mental disease or defect lacks capacity to understand the proceedings against him or to assist in his own defense shall be tried, convicted or sentenced for the commission of an offense so long as the incapacity endures.

2. Whenever any judge or magistrate has reasonable cause to believe that the accused has a mental disease or defect excluding fitness to proceed he shall, upon his own motion or upon motion filed by the state or by or on behalf of the accused, by order of record, appoint one or more private physicians to make a psychiatric examination of the accused or shall direct the superintendent of a facility of the division of mental diseases to have the accused so examined by one or more physicians whom the superintendent shall designate. The order shall specify the time, place, and conditions under which the examinations shall be conducted, and shall direct that written reports of the examination be filed with the clerk of the court. The order may include provisions for the interview of witnesses or other physicians and for a commitment of the accused to a hospital or other suitable facility for such time and under such conditions as the court deems necessary for the purpose. If the order specifies commitment to a facility of the division of mental diseases, the examining physician shall not be named in the order.

3. A report of the psychiatric examinations shall include:

(1) Detailed findings;

(2) An opinion as to whether the accused has a mental disease or defect, and the duration thereof;

(3) An opinion as to whether the accused, as a result of mental disease or defect, lacks capacity to understand the proceedings against him or to assist in his own defense;

(4) An opinion as to whether at the time of the alleged criminal conduct the accused as a result of mental disease or defect did not know or appreciate the nature, quality or wrongfulness of his conduct or as a result of mental disease or defect was incapable of conforming his conduct to the requirements of law;

(5) A recommendation as to whether the accused should be held in custody in a suitable hospital facility for treatment pending determination by the court of the issue of mental fitness to proceed; and

(6) A recommendation as to whether the accused, if found by the court mentally fit to proceed, should be detained in such hospital facility pending further proceedings.

4. The clerk of the court shall deliver copies of the report to the prosecuting or circuit attorney and to the accused or his counsel. The report shall not be a public record or open to the public. Within five days after the filing of the report, both the accused and the state shall, upon written request, be entitled to an order granting them an examination of the accused by a physician of their own choosing and at their own expense. If such examination is ordered, a report of the examination made by the examining physician shall be furnished to the court and to the opposing party.

5. If the psychiatric report contains the recommendation that the accused should be held in custody in a

suitable hospital facility pending determination of the issue of mental fitness to proceed, and if the accused is not admited to bail, or released on other conditions, the court may order that the accused be committed to or held in a suitable hospital facility pending determination of the issue of mental fitness to proceed.

6. If neither the state nor the accused nor his counsel contests the opinion referred to in subsection 3, subdivision (3), of this section relative to fitness to proceed, the court may make a determination and finding of record on the basis of the report filed or may hold a hearing on its own motion. If any such opinion is contested the court shall hold a hearing on the issue. The report or reports may be received in evidence at any hearing on the issue but the party contesting any opinion therein relative to fitness to proceed shall have the right to summon and cross-examine the physicians who rendered such opinion and to offer evidence upon the issue.

7. If the court determines that the accused has mental fitness to proceed and does not admit the accused to bail, or release him on other conditions, the court may order that the accused be committed to or held in a suitable hospital facility pending further proceedings. If the court determines that the accused lacks mental fitness to proceed, the proceedings against him shall be suspended and the court shall commit him to the custody of the director of the division of mental disease for so long as the unfitness endures or until the charges or proceedings are disposed of according to law. The committed person shall be entitled to the writ of habeas corpus upon proper petition to the court which committed him. The issue of his mental fitness to proceed after such a commitment may also be raised by a motion filed by the director of the division of mental

diseases or by the state, alleging the mental fitness of the accused to proceed. A psychiatric report relating to the issue of the accused's mental fitness to proceed may be attached thereto. If the motion is not contested by the accused or his counsel or if after a hearing on the motion the court finds the accused mentally fit to proceed, or if he is ordered discharged from the director's custody upon a habeas corpus hearing, the criminal proceedings shall be resumed. If, however, the prosecuting or circuit attorney determines that so much time has elapsed since the commitment of the accused that it would be unjust to resume the criminal proceedings, the court may dismiss the charge.

8. If the charges against any accused person are dismissed either by the state or by the court and if he is then in custody of the director of the division on mental diseases, he shall not be retained in such custody or in any hospital unless proper proceedings have been instituted and held as provided in sections 202.780 to 202.875, RSMo, in which case these sections and no others shall be applicable to his continued retention, hospitalization and discharge.

9. No statement made by the accused in the course of any examination or treatment pursuant to this section and no information received by any physician or other person in the course thereof, whether such examination or treatment was made with or without the consent of the accused or upon his motion or upon that of others, shall be admitted in evidence against the accused on the issue of guilt in any criminal proceedings then or thereafter pending in any court, state or federal. A finding by the court that the accused is mentally fit to proceed shall in no way prejudice the accused in a defense to the crime charged on the

ground that at the time thereof he was afflicted with a mental disease or defect excluding responsibility, nor shall such findings by the court be introduced in evidence on that issue nor otherwise brought to the notice of the jury.

ADDENDUM B

27.26 Sentence Unlawful–Motion to Vacate or Correct–Forum and Scope of Motion–Notice to Prosecuting Attorney–Appointment of Counsel–Hearing–Order–Effect of Order–Appeal. A prisoner in custody under sentence and claiming a right to be released on the ground that such sentence was imposed in violation of the Constitution and the laws of this State or the United States, or that the court imposing such sentence was without jurisdiction to do so, or that such sentence was in excess of the maximum sentence authorized by law or is otherwise subject to collateral attack, may file a motion at any time in the court which imposed such sentence to vacate, set aside or correct the same. The following procedure shall be applicable to motions filed pursuant to this Rule:

(a) Nature of Remedy. This Rule is intended to provide the exclusive procedure which shall be followed when a prisoner in custody seeks relief on the basis of any of the attacks on a sentence enumerated above. The motion seeking such relief shall be filed in the court where the sentence was imposed. This Rule does not suspend the rights available by habeas corpus but rather prescribes the procedure to be followed in seeking the enforcement of those rights. It includes all relief heretofore available in any court by habeas corpus when used for the purpose of seeking to vacate, set aside or correct a sentence, plus relief not available by habeas corpus. A motion filed hereunder is an independent civil action which should be separately docketed. The procedure before the trial court and on appeal is governed by the Rules of Civil Procedure insofar as applicable. No cost deposit shall be required.

(b) When Remedy May Be Invoked.

(1) The provisions of this rule may be invoked only by one in custody claiming the right to have a sentence vacated, set aside or corrected.

(2) A motion to vacate, set aside or correct a sentence cannot be maintained while an appeal from the conviction and sentence is pending or during the time within such an appeal may be perfected.

(3) A proceeding under this Rule ordinarily cannot be used as a substitute for direct appeal involving mere trial errors or as a substitute for a second appeal. Mere trial errors are to be corrected by direct appeal, but trial errors affecting constitutional rights may be raised even though the error could have been raised on appeal.

(c) Form and Sufficiency of Motion. A motion to vacate a sentence must be submitted on a form substantially in compliance with the form appended hereto. The motion shall include every ground known to the prisoner for vacating, setting aside or correcting his conviction and sentence. The prisoner shall verify the correctness of the motion, including the fact that he has recited all claims known to him.

(d) Successive Motions. The sentencing court shall not entertain a second or successive motion for relief on behalf of the prisoner where the ground presented in the subsequent application was raised and determined adversely to the applicant on the prior application or where the ground presented is new but could have been raised in the prior motion pursuant to the provisions of subsection (c) of this Rule. The burden shall be on the prisoner to establish that any new ground raised in a second motion could not have been raised by him in the prior motion.

(e) Hearing. As soon as a motion hereunder is received by the circuit clerk, he shall notify the

prosecuting attorney and transmit a copy thereof to him. If appointment of counsel is required under (h) of this Rule, such counsel shall be appointed immediately and a copy of the motion transmitted to him. Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, a prompt hearing thereon shall be held. "Prompt" means as soon as reasonably possible considering other urgent business of the court. This hearing shall be an evidentiary hearing if issues of fact are raised in the motion, and if the allegations thereof directly contradict the verity of records of the court, that issue be determined in the evidentiary hearing. All proceedings on the motion shall be recorded by the official court reporter.

(f) Burden of Proof. The prisoner has the burden of establishing his grounds for relief by a preponderance of the evidence.

(g) Presence of Prisoner. The prisoner shall be produced at any evidentiary hearing on a motion attacking a sentence where there are substantial issues of fact.

(h) Right to Counsel. If a motion presents questions of law or issues of fact, the court shall appoint counsel immediately to assist the prisoner if he is an indigent person. Counsel shall be given a reasonable time to confer with the prisoner and to amend the motion filed hereunder if desired. Counsel shall have the duty to ascertain from the prisoner whether he has included all grounds known to the prisoner as a basis for attacking the judgment and sentence and to amend the motion to include any claims not already included. If, for good cause shown, appointed counsel is permitted to withdraw, the trial court shall appoint new counsel in his stead.

(i) Judgment. The court shall make the findings of fact and conclusions of law on all issues presented, whether or not a hearing is held. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was illegal or otherwise subject to collateral attack, or that there was such a denial or infringement of the constitutional rights of the prisoner as to render the judgment subject to collateral attack, the court shall vacate and set aside the judgment and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

(j) Appeal. An order sustaining or overruling a motion filed under the provisions of this Rule shall be deemed a final judgment for purposes of appeal by the prisoner or by the State. An appeal may be taken from the order entered on the motion as in a civil case as authorized by §512.020, RSMo 1959, V.A.M.S. Appellate review shall be limited to a determination of whether the findings, conclusions and judgment of the trial court are clearly erroneous.

(k) Costs. If the trial court finds that a prisoner desiring to appeal is an indigent person, it shall authorize an appeal *in forma pauperis* and furnish without cost the transcript of such proceeding for appellate review. The trial court, when the appeal is taken, shall order the official court reporter to prepare the transcript promptly. If the trial court finds adversely to a prisoner on the issue of indigency, it shall certify and transmit to the appellate court of a transcript of the evidence on that issue only so as to permit review of that issue by the appellate court.

(l) Counsel on Appeal. If a prisoner desires to appeal and contends he is without means to employ counsel to

perfect the appeal, the trial court, if satisfied that the prisoner is an indigent person, shall appoint competent counsel to conduct such appeal. Such counsel may, in the discretion of the court, be the same counsel who represented the prisoner in the trial court on said motion. If, for good cause shown, appointed counsel is permitted to withdraw, the trial court shall appoint new counsel in his stead.

ADDENDUM C

559.260. Rape, punishment.—Every person who shall be convicted of rape, either by carnally and unlawfully knowing any female child under the age of sixteen years, or by forcibly ravishing any woman of the age of sixteen years or upward, shall suffer death, or be punished by imprisonment in the penitentiary for not less than two years, in the discretion of the jury.